UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§ Civil Action No. H-01-3624 § **(Consolidated)** § § CLASS ACTION
This Document Relates To: MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	§
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. KENNETH L. LAY, et al., Defendants.	§

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE DEUTSCHE BANK DEFENDANTS' MOTION TO DISMISS

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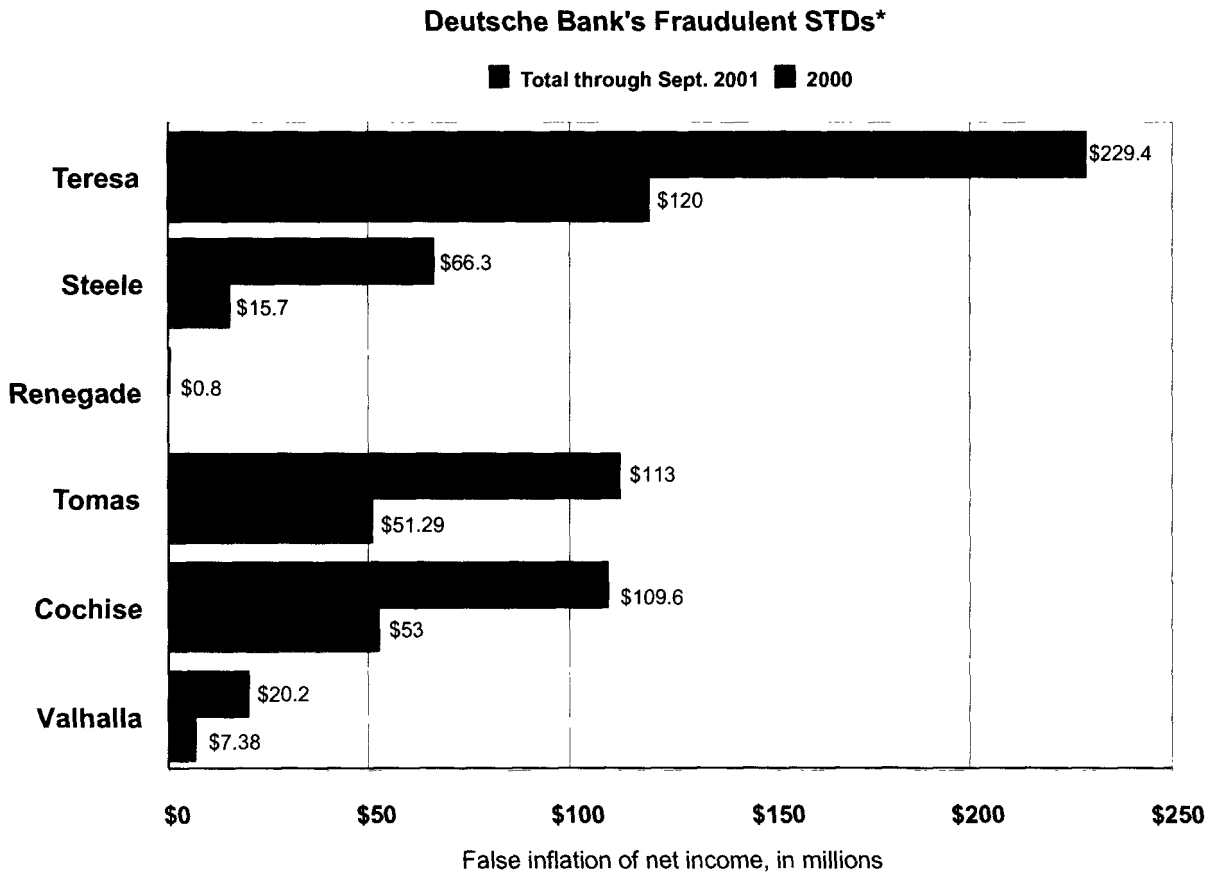
I. INTRODUCTION

Lead Plaintiff hereby respectfully submits this Opposition to the motion to dismiss filed by Deutsche Bank AG, Deutsche Bank Trust Company Americas, and Deutsche Bank Securities Inc. (collectively, "Deutsche Bank").

Deutsche Bank's motion to dismiss all claims against it attempts to rewrite Deutsche Bank's role in the Enron fraud, which was recently revealed and chronicled in detailed reports issued by Congressional investigators and Enron's Bankruptcy Examiner. While the previous complaint in this action was filed before revelation of Deutsche Bank's conduct, the First Amended Complaint demonstrates that Deutsche Bank's involvement in the Enron fraud was at least as significant as the involvement of the other Bank Defendants against whom this case now proceeds. Indeed, Deutsche Bank designed, funded, and executed numerous fraudulent structured tax deals (the "STD"s) that materially inflated Enron's financial statements.



*Source: The Washington Post

Meanwhile, Deutsche Bank issued false and misleading analyst reports praising Enron for the financial results inflated by Deutsche Bank's STDs, underwrote securities offerings predicated on Enron's false financial statements, funded LJM2, and advised LJM2 on additional transactions that falsified Enron's financial statements.

Deutsche Bank attempts to escape liability for plaintiffs' detailed allegations by asserting statute of limitations defenses. But plaintiffs' claims were brought well within the applicable period of repose and the First Amended Complaint was filed timely after notice of Deutsche Bank's conduct. *See infra* §II.A. Indeed, secondary actors like Deutsche Bank could easily make it impossible for investors to assert violations of Rule 10b-5(a) and (c) under the statute of limitations arguments Deutsche Bank claims here.

Deutsche Bank claims that plaintiffs' allegations are "conclusory and do not meet Rule 9(b)'s requirements that the circumstances of fraud be pled with particularity." Motion at 12. The Fifth Circuit "requires a plaintiff 'to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent.'" *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 412 (5th Cir. 2001).[1] Plaintiffs do so with respect to each statement made by Deutsche Bank. Additionally, plaintiffs' allegations concerning the STDs satisfy particularity standards. Plaintiffs plead with detail how the STDs functioned, the impact of the STDs upon Enron's financials, why the STDs violate tax and accounting standards, and Deutsche Bank's role in the STDs. The First Amended Complaint's allegations concerning the STDs derive from the Joint Committee on Taxation's ("JCT") Report totaling over 700 pages and nearly 200 pages devoted to Enron's tax transactions in the Bankruptcy Examiner's Second Report.[2] *See, e.g.*, ¶¶797.2-797.4 (referencing both investigative reports).

Deutsche Bank not only makes groundless complaints about the level of particularity found in the First Amended Complaint, but also misrepresents plaintiffs' allegations and the public record

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[1]Here, as elsewhere, citations and footnotes are omitted and emphasis is added unless otherwise noted.

[2]Citations to the Examiner's Second and Third Interim Reports are stated as 2nd or 3rd Report at ___. The cited pages are attached hereto at Ex. A. The cited pages to the JCT Report are attached hereto as Ex. B. The entire Report can be found at www.house.gov/jct.

upon which those allegations are based. "While it is perfectly proper to use shorthand phrases to describe [plaintiffs'] claims, the Defendants have rewritten the Complaint[] in a way that they believe favors dismissal. It must be remembered, however, that Plaintiffs are the master of their complaint and 'neither this Court nor the defendant have the right to redraft the complaint to include new claims.'" *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 332 (S.D.N.Y. 2003). While Deutsche Bank's improprieties in this regard are too numerous to recite in entirety, the side-by-side comparison below is illustrative:

Deutsche Bank's Claim	***Contrary Facts Alleged and Supported***
The Third Report "belies" the conclusion that Deutsche Bank "created fraudulent transactions to unlawfully inflate Enron's earnings." Motion at 12; *see also id.* at 5, 16 (same).	Deutsche Bank "***designed, promoted and participated in*** the [STDs] while ***knowing*** that the transaction[s] served ***no substantial business purpose*** for Enron other than enabling Enron to report the potential benefit of speculative future tax deductions in an ***erroneous and misleading manner*** as pre-tax income" 3rd Report, App. G at 3-4.
"The Examiner also found no evidence that [Deutsche Bank] ever advised Enron on the tax and accounting decisions made by Enron and with which the Examiner took issue." Motion at 21.	"BT/Deutsche developed the basic tax and accounting structures and promoted them to Enron as a means of generating accounting income." 3rd Report, App. G at 83.
"[E]ven the critics agree [the STDs] were designed to comply with tax law and accounting standards ...." Motion at 7.	The tax laws require transactions to have a business purpose; the STD's only purpose was to "'artificially create income to report to shareholders.'" *See, e.g.*, ¶797.6 (quoting recognized tax expert).
The JCT Report found "the SSTs were consistent with the tax laws." Motion at 23.	The STDs were "tax-motivated transactions" that "violate the letter or the spirit of the law." JCT Report at 16.
A letter drafted by Congressman Richard Neal and Edward Markey "nowhere asserts that the SSTs were fraudulent." Motion at 23 n.31.	"'It is clear that the [Teresa] transaction was designed for the sole purpose of ***artificially*** inflating Enron's accounting income.'" "'A more stark example of the ***abusive nature*** of the Enron structured transactions could not be imagined.'" Deutsche Bank should be penalized for "'artificially creating earnings to report to [Enron's] shareholders.'" ¶797.4 (quoting letter).
"[P]laintiffs do not allege any *facts* which indicate that [Deutsche Bank] attempted to circumvent any accounting or other rules ...." Motion at 20-21 (emphasis in original).	Deutsche Bank purported to comply with the "business purpose" tax rule, which requires all transactions to have a valid business purpose ***other than generating tax savings***, by claiming the business purpose was to "'***artificially create income to report to shareholders***.'" ¶797.6.

Deutsche Bank's Claim	*Contrary Facts Alleged and Supported*
Deutsche Bank "presented the [STDs] to the Federal Reserve, its banking regulator ... a fact that undermines any suggestion that these transactions were designed to defraud." Motion at 14.	There is "no indication that bank regulators ever reviewed or approved the proposed tax or accounting consequences of the structures." 3rd Report, App. G at 84.
"SSTs were even reviewed by the IRS." Motion at 15 (citing JTC Report at 157).[3]	"The Joint Tax Committee report provides us a wealth of information. Much of this information has never been seen before, not only by the public but also the IRS and other government agencies." The JCT Report demonstrates that the SSTs were so complex as to "raise[] serious concerns about the ability of the IRS to ever find out about these transactions." Sen. Charles E. Grassley (R-IA).
"On Project Teresa, the Examiner admits that no IRS-related adjustments are expected." Motion at 15 n.20 (citing 2nd Report, App. J, Ann. 2 at 26).[4]	"The IRS could be expected to attack [Project Teresa]." ... However, because [of circumstance] the IRS will never have occasion to express its views on whether the depreciation deductions are allowable." 2nd Report, App. J, Ann. 4 at 26.

Contrary to what Deutsche Bank suggests, plaintiffs plead the exact amount that the STDs artificially inflated Enron's earnings, and the amount Deutsche Bank earned for its role in creating the STDs. *Id.* As an example, plaintiffs' allegations with respect to Project Steele demonstrate: (a) how and when Deutsche Bank introduced Project Steele to Enron (¶797.11); (b) the date Project Steele was closed (*id.*); (c) Deutsche Bank's role in carrying out Project Steele (¶¶797.11-797.12); (d) Project Steele's fundamental structure (the transfer of REMICs to an entity owned by both Deutsche Bank and Enron so both could write-off deductions on these mortgage-backed securities in future years) (¶797.13); (e) why experts believe Project Steele violated the tax laws (quoting an expert interviewed by *Business Week*) (*id.*); (f) the artificial earnings resulting from Project Steele in violation of GAAP ($65 million) and the amount Deutsche Bank earned for its role in Project Steele ($10 million) (¶797.14); and (g) facts providing a strong inference that Deutsche Bank acted with scienter (including an agreement between Deutsche Bank and Enron that automatically

[3]Notably, the referenced IRS examination "was limited to examining whether [one entity in Project Steele] satisfied the REIT qualification." JCT Report at 157. This hardly qualifies as a thorough audit finding Project Steele to be in compliance with applicable requirements.

[4]There is no page 26 of the 2nd Report, App. J, Ann. 2. Deutsche Bank means to refer to Annex 4.

terminated Project Steele if it was ever disclosed to anyone else) (¶797.15). This is more than enough to satisfy Rule 9(b)'s particularity requirement.

For all the reasons stated herein, Deutsche Bank's motion should be denied.

II. ARGUMENT

A. Lead Plaintiffs' Newly-Added Allegations Are Not Time-Barred

Deutsche Bank seeks to avoid liability because its STDs ***closed*** greater than three years prior to the filing of plaintiffs' First Amended Complaint, which purportedly renders plaintiffs' claims stale. *See* Motion at 7-8. Lead Plaintiff amended the Consolidated Complaint within the statute of limitations provided by The Public Company Accounting Reform and Investor Protection Act of 2002 ("Sarbanes-Oxley"), and within the limitations period under *Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson*, 501 U.S. 350, 364 (1991). Deutsche Bank fails to support its assumption that the limitations period applicable here is the period set forth in *Lampf*. As Lead Plaintiff demonstrated in its Opposition to the Bank Defendants' Motions to Dismiss the First Amended Consolidated Complaint ("Omnibus Opposition") filed July 17, 2003, Sarbanes-Oxley applies to Lead Plaintiff's amended claims. *See* Omnibus Opposition at §II. And, as demonstrated in the foldout chart on the next page, plaintiffs' claims are brought timely under either limitations period.

Statute Of Limitations Now Deutsche Defendants Named In Amended Complaint

Deutsche Bank also ignores the breadth of its conduct that occurred throughout the Class Period – conduct for which Lead Plaintiff timely brings claims. That conduct includes a broad range of securities violations arising out of false and misleading analyst reports and securities offering documents, as well as involvement in LJM2 and the creation of fraudulent STDs. *See* ¶¶787-797. Deutsche Bank focuses on its STDs in isolation, claiming the purported "close" date of agreements at the beginning of the transactions renders its securities violations inactionable. But Deutsche Bank's actions with respect to the STDs did ***not*** end at the purported "close" date of the transactions. In fact, the so-called "close" of these transactions merely involved the signing of documents forming a partnership or some other entity in which Enron and Deutsche Bank called themselves investors. In each STD, Deutsche Bank continued to play a significant role in carrying out the transaction over a period of several years. And the transaction had to be carried out to inflate Enron's financial statements.

Thus, first, if the "close" of transactions within the STDs could constitute a violation of the securities laws, Deutsche Bank is liable for "closing" the transactions, and Lead Plaintiff's claims pertaining to the STDs alone are timely, because Deutsche Bank's "close" of the transactions was a part of continuing conduct that violated §10(b) repeatedly throughout the Class Period. *See, e.g., Huckabay v. Moore*, 142 F.3d 233, 239 (5th Cir. 1998); *SEC v. Ogle*, No. 99C609, 2000 U.S. Dist. LEXIS 239, at *13 (N.D. Ill. Jan. 10, 2000).

Second, Deutsche Bank is separately liable for its conduct subsequent (and equally if not more significant) to the beginning of its role in the fraudulent STDs, and Lead Plaintiff's claims were timely brought for that conduct, which occurred throughout the Class Period.[5] Indeed, Deutsche

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[5]As this Court stated:

> Where Lead Plaintiff has once adequately alleged that a party took such an affirmative step with scienter, not only that immediate act or material misrepresentation or omission, which without adequate public disclosure directly or indirectly manipulated the financial picture of Enron or the value of its securities, ***any alleged subsequent activity by that party***, such as continuing to lend funds to Enron-controlled SPEs or soliciting or selling Enron securities or even silence, ***necessarily becomes suspect as further complicity in, expansion of, and perpetuation of the alleged Ponzi scheme.***

In re Enron Corp. Sec. Litig., 235 F. Supp. 2d 549, 695 (S.D. Tex. 2002).

Bank's STDs inflated Enron's financial statements after they "closed," Deutsche Bank continued its role in the transactions years after the "close" so that the intended financial statement effect would occur, and Deutsche Bank continued to receive its fees years afterward for its conduct. Deutsche Bank's continuing conduct in the fraudulent STDs or even issuance of false and misleading analyst reports, underwriting of Enron and Enron-related securities offerings, or participation in LJM2, which falls within the period of repose, is no less actionable simply because of the "close" of an initial agreement in the STDs.

Third, Deutsche Bank fails to explain or support its claim that the "close" of agreements within its STDs constituted a securities violation that initiated the period of repose. In this case there was no such violation until Deutsche Bank's conduct affected (or "touched upon") the price of Enron's securities, more specifically, until Enron's financial results were inflated by the STDs. *See infra* §II.D. It was Deutsche Bank's conduct ***after*** the "close" date that inflated Enron's financial results. If Deutsche Bank did not carry out the transactions after the transactions were conceived and documented, Enron's financial statements would not have been affected.

While there is no case law directly on point to demonstrate the common sense proposition above, this situation is no different than a misrepresentation case (Rule 10b-5(b)), where it is established that the misrepresentation is the securities violation that initiates the statute of limitations. *See, e.g., Wafra Leasing Corp. 1999-A-1 v. Prime Capital Corp.*, 192 F. Supp. 2d 852, 864 (N.D. Ill. 2002). In *Wafra*, the court held that the repose period begins to run when a violation occurs, and in a case under Rule 10b-5(b), "[i]t is the misrepresentation 'in connection with the purchase or sale, not the sale itself, that violates Rule 10b-5.'" *Id.*

Thus, it was not until Deutsche Bank carried out its STDs that Enron's financial statements were inflated and a violation occurred. This is apparent from the facts alleged in the First Amended Complaint, as shown herein. In any event, what steps Deutsche Bank took to carry out its STDs is a factual matter not suitable for resolution on a motion to dismiss.

A few examples demonstrate the importance of Deutsche Bank's continuing conduct with respect to the STDs.

1. Project Cochise

Project Cochise involved the transfer of mortgage-backed securities and other assets from Deutsche Bank to an Enron affiliate, whereby both Enron and Deutsche Bank improperly sheltered taxable income with the tax deductions from the same assets. ¶797.20. Deutsche Bank maintained a continuing role in Project Cochise well into the Class Period. Indeed, even though Project Cochise closed in January 1999, Deutsche Bank was to earn fees starting in September 1999 through December 2002 for its continuing participation in the STD. ¶797.20.

Step 1 of Project Cochise required Enron to purchase two airplanes from Deutsche Bank for $46.7 million in January 1999. *See* JCT Report at 151-52; 3rd Report, App. G at 37, 51-52. Step 2 required Deutsche Bank to buy back the same planes from Enron for $36.5 million on June 28, 2000. The planes were later to be sold, again, to Enron, one month later through an Enron subsidiary named Oneida. *See id.* Upon selling the Cochise planes back to Deutsche Bank on June 28, 2000, "Enron reported the entire sale proceeds of $36.5 million as net income on the sale." 3rd Report, App. G at 52. "Enron's recognition of gain on the sale of the Cochise planes did not comply with GAAP for several reasons." *Id.*[6] Thus, there can be no doubt that Deutsche Bank's re-purchase of the Cochise planes on June 28, 2000 – an action committed as part of the fraudulent Project Cochise STD – occurred not greater than three years before Lead Plaintiff filed the First Amended Complaint.

Moreover, Deutsche Bank not only played a primary role in the second phase of Project Cochise, but Deutsche Bank's role in structuring the first phase of the transaction required Deutsche Bank to commit primary violations of the federal securities laws throughout the Class Period. As part of Project Cochise, Deutsche Bank became a partner with Enron in a phony Deutsche Bank entity called Maliseet. JCT Report at 150-51. Deutsche Bank and Enron were the principal investors in Maliseet. *Id.* And they entered a shareholders' agreement with respect to Maliseet that

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[6]Deutsche Bank asserts that the Examiner did not find Deutsche Bank acted with scienter in violating GAAP on the sale of the Cochise planes. Motion at 17-19. The Examiner's report belies any such contention: "After Enron concluded that it could not recognize gain on a direct sale to Oneida, ***Enron and BT/Deutsche Bank devised a plan*** to transfer the Cochise Planes first to a BT/Deutsche entity, and then to Oneida. Enron's recognition of gain on the two-step transfer, however, ***was plainly a violation of GAAP....***" 3rd Report, App. G at 54.

called for Deutsche Bank to commit acts in furtherance of Project Cochise as late as January 28, 2004. *Id.* at 151, 154. Maliseet played an essential role in Project Cochise, which artificially inflated Enron's earnings by $27.7 million in 1999, $50.3 million in 2000 and $23.2 million in 2001. *Id.* at 148 n.347, 150-54. Meanwhile, Deutsche Bank issued false and misleading analyst reports praising Enron for that inflated income, and underwrote securities offerings predicated on Enron's false financial statements.

2. Project Tomas

"Project Tomas was structured to increase the tax basis of a portfolio of leased assets that Enron liquidated." ¶797.25; JCT Report at 189. This liquidation was not to occur for at least two years. Even though Project Tomas "closed" in September 1998, Deutsche Bank continued to act in furtherance of the fraudulent scheme throughout the Class Period. Like in each of the other fraudulent transactions, Deutsche Bank's continuing participation was necessary to make Project Tomas work. As stated by the JCT Report: "'To dispose of the leased assets with a stepped-up basis without incurring tax, ***Enron formed a partnership with Bankers Trust***, which in essence served as an accommodation party in the transaction. Without a willing though unrelated third party to hold the leased assets through a partnership ***for at least two years before selling them off***, the tax savings and financial statement benefits claimed through the use of this structure would not have been possible.'" ¶797.27 (quoting JCT Report at 206).

Indeed, "central" to Project Tomas was the sale of assets by Deutsche Bank and Enron in December 2000. JCT Report at 200-21. The Enron/Deutsche Bank partnership, named Seneca, existed until nearly the end of 2000, when it sold the Project Thomas assets. *Id.* at 196. And another part of Project Tomas involved the maintenance of approximately $250 million notes receivable by Deutsche Bank, which was repaid December 2001. *Id.* at 200. The JCT Report estimates Project Tomas caused Enron's financial statements to be artificially inflated by $55.99 million in 1998, $9.85 million in 1999 and $51.29 million in 2000. ¶797.27; JCT Report at 190 n.487. In addition to this income recognized from Project Tomas, the transaction also provided Enron with $95 million in tax savings in 1998-2001. *Id.* Thus, during the Class Period, Deutsche Bank was a partner in the entity at the heart of Project Tomas that resulted in Enron's earnings being materially and artificially

inflated. ¶797.18. Meanwhile, Deutsche Bank issued false and misleading analyst reports praising Enron for those inflated earnings, and underwrote securities offerings predicated on Enron's false financial statements.

3. Project Steele

Project Steele, like Project Cochise, allowed Enron and Deutsche Bank "'each to claim a deduction for the same pool of money-closing mortgage-backed securities owed by the investment bank.'" ¶797.13 (quoting *Business Week*). As in Project Cochise, Deutsche Bank was paid for creating Project Steele and also for its ***continuing participation*** in the fraudulent transaction. ¶797.14. In October 1997, Deutsche Bank bought into ECT Partners (the Enron SPE at the heart of Project Steele), and in return Deutsche Bank received "approximately a five percent preferred ownership interest in ECT Partners." JCT Report at 139.[7] Deutsche Bank intended to, and did in fact, remain a partner of ECT Partners throughout the Class Period in order to achieve the financial statement manipulations for which Enron paid Deutsche Bank. *Id.* at 139 n.324. Even though Project Steele "closed" in 1997, Steele (through ECT Partners) contributed $65 million in net earnings to Enron's bottom line from 1997 through 2001. ¶797.14. Thus, Deutsche Bank was engaged in falsifying Enron's financial statements throughout the Class Period.

Deutsche Bank agreed to further Project Steele long after the transaction closed (again, acting during the Class Period) to falsely inflate Enron's financial statements through 2001. As noted in the JCT Report:

> In order to provide substance to the [Project Steele] transaction, Bankers Trust [*i.e.*, Deutsche] anticipated ***holding the stock received until at least 2002***. In order to compensate Bankers Trust for delaying the realization of its tax loss for a number of years, Bankers Trust requested Enron pay Bankers Trust the present value cost of delaying such losses. This was described in correspondence between Bankers Trust and Enron that qualified the present value cost to Bankers Trust of entering into Project Steele.

JCT Report at 135-36. Thus, even though Project Steele "closed" in 1997, Deutsche Bank continued to act as Enron's partner in the fraudulent transaction through the end of the Class Period and was paid for its continuing role. Meanwhile, Deutsche Bank issued false and misleading analyst reports

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[7] *See also* ¶797.13 ("'BT transferred these securities, known as REMICs, to a new partnership known as ECT Investing Partners that it jointly owned with Enron.'").

praising Enron for the inflated income Project Steele caused, and underwrote securities offerings predicated on Enron's false financial statements.

4. Project Teresa

Project Teresa purportedly enabled Enron to take greater write-offs of its office building in future years, which Enron accounted for as present income, by artificially inflating the building's value $1 billion. ¶797.16. Project Teresa, like Project Steele, worked because Enron was able to create two phony SPEs with Deutsche Bank. These phony SPEs artificially inflated Enron's reported financial results throughout the Class Period, and Deutsche Bank was an "investor" in and maintained its conduct in Project Teresa throughout the Class Period, regardless of the date that Project Teresa "closed."

According to Congressional investigators:

> The initial step in the implementation of Project Teresa was the organization and financing of the various participating entities. On March 21, 1997, Enron Corp., togther with ... EN-BT Delaware, Inc. ("EN-BT Delaware") (a subsidiary of Bankers Trust [*i.e.*, Deutsche]) contributed property to Organizational Partner, Inc. ("Organizational Partner" or "OPI") in exchange for OPI common stock and OPI preferred stock.... EN-BT Delaware [along with another investor] collectively contributed $22.4 million in cash in exchange for 20,000 shares of OPI preferred stock that represented two percent of the equity and 25 percent of the voting rights in Organizational Partner.

JCT Report at 168. Deutsche Bank, through EN-BT Delaware also "contributed $10.433 million in cash in exchange for a one percent limited partner interest" in Enron Leasing Partners, LP. *Id.*; *see also* ¶797.17.

Project Teresa worked because Deutsche Bank's entities "implemented a plan of quarterly pro-rata redemptions" to "generate income for financial accounting purposes." JCT Report at 169. To accomplish this, Deutsche Bank continued its conduct and remained a partner in OPI and Enron Leasing Partners, LP throughout the Class Period. *Id.* at 170.[8] Accordingly, Project Teresa artificially inflated Enron's earnings by $226 million from 1997-2001. ¶797.18. Meanwhile, Deutsche Bank issued false and misleading analyst reports praising Enron for those inflated earnings, and underwrote securities offerings predicated on Enron's false financial statements.

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[8] *See also* ¶797.17 ("'Bankers Trust (the promoter of the transaction) contributed cash to the partnership.'").

5. Lead Plaintiff Amended the Consolidated Complaint Within *Lampf's* One Year Statute of Limitations Period

Only with respect to the STDs and only with respect to Deutsche Bank Trust Company Americas ("DBTC") and Deutsche Bank Securities Inc. ("DBSI") does Deutsche Bank assert that plaintiffs' First Amended Complaint is untimely for failure to comply with the one-year statute of limitations set forth in *Lampf.* Motion at 8. (This argument is not made with respect to Deutsche Bank AG. *Id.*) Notably, however, the applicable statute with respect to DBTC and DBSI, both newly-added parties, is ***two*** years, pursuant to Sarbanes-Oxley. *See* Omnibus Opposition at §II. Regardless, plaintiffs' claims were clearly filed within one year of being put on notice of any claims with respect to the STDs.

While plaintiffs do not concede that they were put on notice as to any claims against DBSI or DBTC as of May 22, 2002, Deutsche Bank itself uses that date as a benchmark. *See* Motion at 9 ("Plaintiffs were aware of the facts and circumstances surrounding the STDs and the DB Entities at least as far back as May 22, 2002 ...."). The proceedings against the newly-added Deutsche Bank Entities commenced on May 14, 2003 with the filing of the First Amended Complaint. *See* Fed. R. Civ. P. 3; *Ramming v. United States*, 281 F.3d 158, 164 (5th Cir. 2001), *cert denied*, 536 U.S. 960 (2002). As May 14, 2003 is less than one year after May 22, 2002, Deutsche Bank's argument is without merit.[9]

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[9]Deutsche Bank also argues that plaintiffs had "notice of an alleged securities fraud on October 22, 2001, the date on which plaintiffs filed their first complaint in this action." Motion at 9. However, plaintiffs were only on notice as to claims against certain other defendants at that time. Plaintiffs assiduously investigated all possible claims at that time, but had no reason to suspect Deutsche Bank had entered into fraudulent tax transactions with Enron. Deutsche Bank can point to no publicly available facts that would have put plaintiffs on notice of the STDs at any time prior to May 22, 2002 – let alone in October 2001. *See, e.g., Levitt v. Bear Stearns & Co.*, 340 F.3d 94, 2003 U.S. App. LEXIS 16539, at *28 (2d Cir. 2003) ("District Court err[s] in dismissing [a] complaint as time barred [if] there are factual disputes concerning the scope of the inquiry conducted by Plaintiffs and the question of whether a reasonable inquiry could have revealed enough information to satisfy the pleading requirements for §10 (b) primary violator liability, Rule 9(b), and the PSLRA, and those factual disputes should not [be] resolved in favor of [the defendant] on a motion to dismiss.").

B. The First Amended Complaint Properly Alleges Deutsche Bank Is Liable Under §10(b) and Rule 10b-5

1. Lead Plaintiff Sufficiently Alleges Deutsche Bank's Violations of Rule 10b-5(a) and (c)

a. Deutsche Bank's STDs Were Intentionally Deceptive and Violated Applicable Accounting and Tax Standards

In the face of overwhelming evidence to the contrary, not to mention the practically unanimous consensus of experts and laypersons alike, Deutsche Bank asserts that the STDs were not fraudulent. *See* Motion at 13-15. For example, Deutsche Bank – without citing any persuasive case or authority for the proposition – claims that the STDs satisfy GAAP and the tax laws. *Id.* at 15. Deutsche Bank's arguments are factual challenges to Lead Plaintiff's proper allegations, which are not suitable for a motion to dismiss. Moreover, besides being wrong Deutsche Bank asks this Court to draw unreasonable inferences in its favor.[10] But, just as Deutsche Bank may not resolve factual arguments, it may not receive inferences in its favor at this stage of the proceedings. *See Goldstein v. MCI Worldcom*, 340 F.3d 238, 2003 U.S. App. LEXIS 15001, at *8 (5th Cir. 2003) (even in a securities fraud action, the court reviews motion to dismiss "accepting the facts alleged in the plaintiffs' complaint as true and construing their allegations in the light most favorable to them").

Not following GAAP for the purposes of falsely reporting inflated income violates Rule 10b-5. *See, e.g., Goldstein*, 2003 U.S. App. LEXIS 15001, at *23 ("financial statements that are not prepared in conformity with GAAP are presumed to be misleading and inaccurate"). Each STD violated GAAP. "BT/Deutsche developed the basic tax ***and accounting structures*** of each of the BT/Deutsche Tax Transactions." 3rd Report, App. G at 76. The accounting was clearly false

[10] *See, e.g.*, Motion at 15 (Deutsche Bank asserts the STDs complied with GAAP even though the Examiner repeatedly and unequivocally found otherwise); *id.* at 16 (Deutsche Bank asserts that the STDs complied with tax law even though they had no legitimate business purpose, ¶797.6, and recognized experts have universally "ridiculed" them, *see* ¶797.13 (quoting BusinessWeek); *id.* at 18 (Deutsche Bank asserts that the purchase and sale of the Cochise planes was in compliance with GAAP despite the Examiner having concluded otherwise, *see* 3rd Report, App. G at 51-57).

and misleading, and without any basis.[11] Indeed, the "Examiner has searched both the authoritative accounting literature and the professional practice literature and can find ***no situation*** in which expenses or benefits associated with income taxes are ***ever*** appropriately reported on the income statement other than as part of the provision for income taxes." 3rd Report, App. G at 77 n.366. As the First Amended Complaint alleges, Deutsche Bank knew the STDs were transactions without a business purpose other than to artificially inflate Enron's reported earnings.

Technical compliance with GAAP notwithstanding, purposefully deceiving investors violates Rule 10b-5. As the Eighth Circuit held:

> A securities fraud complaint need not allege GAAP violations to establish that a material misstatement occurred in a company's financial statements. The accounting standards and the requirements of Rule 10b-5 are not "perfectly coextensive." Compliance with GAAP does not provide immunity from 10b-5 liability....

In re K-Tel Int'l Sec. Litig., 300 F.3d 881, 906 (8th Cir. 2002). *Accord In re Terayon Communs. Sys.*, No. C00-01967 MHP, 2002 U.S. Dist. LEXIS 5502, at *21-*22 (N.D. Cal. Mar. 29, 2002) (manipulation of earnings need not violate GAAP to be actionable). Regardless of GAAP compliance, the STDs were deceptive.

Deutsche Bank's STDs artificially inflated Enron's earnings by hundreds of millions of dollars without ever being disclosed to investors. Even assuming, *arguendo*, that the STDs were in compliance with the technical requirements of GAAP – they were not – the STDs were still fraudulent. Each STD "was misleading because a reader of Enron's financial statements had no way of knowing that purported pre-tax income from operations actually consisted of the potential benefit of speculative future tax deductions." 3rd Report, App. G at 35. As the First Amended Complaint alleges, Deutsche Bank knew the STDs were being hidden from plaintiffs. *See infra* pp.19-21.

Violating the Tax Code to inflate financial results runs afoul of Rule 10b-5. *See, e.g., In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 285 (E.D.N.Y. 2002) (upholding Rule 10b-5 claim

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[11] *See, e.g.*, 3rd Report, App. G at 35 ("Enron's accounting treatment of the Steele Transaction did not comply with GAAP"); *id.* at 42 ("Enron's accounting treatment of the Cochise Transaction did not comply with GAAP"); *id.* at 43 ("Enron's accounting treatment for the Teresa Transaction did not comply with GAAP"); *id.* at 49 ("Enron's accounting for the Tomas Transaction probably did not comply with GAAP"); *id.* at 52 ("Enron's recognition of gain on the sale of the Cochise Planes did not comply with GAAP").

in which "[t]he gravamen of the Class Action Complaint is that [defendants'] statements and releases contained inflated estimates of [corporation's] financial position because they took into account improperly claimed tax credits"); *see also Ritchey v. Horner*, 244 F.3d 635, 637 (8th Cir. 2001) (denying defendants' motion for summary judgment where plaintiffs' Rule 10b-5 claim was based upon misrepresentation that company "had filed all tax returns required by law, that the returns had been timely filed, and that the corporation had no outstanding tax liabilities"); *Gerson v. Rapoport*, 651 F. Supp. 395, 396 (N.D.N.Y. 1987) (denying motion to dismiss where plaintiff alleged violation of §10(b) and Rule 10b-5 by defendant for "concealing [corporation's] tax liabilities arising from previous, fraudulent tax filings"). Each Deutsche Bank STD violated the tax laws with the purpose of inflating Enron's financial results. *See, e.g.*, ¶797.6.

In defense of the STDs, Deutsche Bank erroneously asserts that the Court should not consider Deutsche Bank or Enron's motive for entering into the transactions. Motion at 13. While Deutsche Bank correctly claims that Enron had a right to decrease its taxes, Deutsche Bank misses the point. A taxpayer may only reduce its taxes via legal means and that requires each transaction to have a business purpose. ¶797.6. "The business purpose doctrine ... establishes that while taxpayers are allowed to structure their business transactions in such a way as to minimize their tax, these transactions must have a ***legitimate*** non-tax avoidance business purpose to be recognized as legitimate for tax purposes." *Boca Investerings P'ship v. United States*, 314 F.3d 625, 631 (D.C. Cir. 2003); *see also Compaq Computer Corp. v. Comm'r*, 277 F.3d 778, 788 (5th Cir. 2001) (transaction must have "***adequate*** non-tax business purpose"); *Holladay v. Commissioner*, 649 F.2d 1176, 1180 (5th Cir. 1981) (transaction must have "***valid*** business purpose"). Deutsche Bank cites no authority to the contrary.[12]

Rather, each case Deutsche Bank references recognizes the necessity of a non-tax business purpose – which, the law requires, implicitly or otherwise, to be legitimate. Here, the STDs' purported purpose was to dupe investors. Deutsche Bank has pointed the Court to no authority

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[12]*See* Motion at 13 citing (among others) *Gregory v. Helvering*, 293 U.S. 465 (1935) (motivation to avoid taxes is not, alone, illegal); *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978) (same); *Sun Props., Inc. v. United States*, 220 F.2d 171 (5th Cir. 1955) (same).

suggesting that, when writing the tax laws, Congress intended to condone such a ridiculous notion. Moreover, motive is relevant to evaluating the legitimacy of a purported business purposed. To "exclude[] from consideration the motive of tax avoidance [where the] transaction upon its face lies outside the plain intent of the statute ... would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." *Gregory*, 293 U.S. at 470 (cited in Motion at 13).

Surprisingly, Deutsche Bank attempts to seek refuge in the Examiner's reports. Deutsche Bank claims that the Examiner explicitly found that transactions like the STDs – *i.e.*, tax transactions that result in financial accounting benefits – are "commonplace." Motion at 13 (citing 3rd Report, App. G at 82). However, the Examiner found no such thing. The Examiner found: "Many firms have promoted tax-advantaged transactions to sophisticated corporations." 3rd Report, App. G at 82. However, other tax transactions do not normally include an income component; a unique element of the STDs setting the conduct of Deutsche Bank apart from that of others. *Id.* at 83. Moreover, the fact that tax-advantage transactions are common has no bearing on whether the STDs were in compliance with the law. And Deutsche Bank's reliance upon the opinions offered by tax professionals is not a valid defense precluding a finding that Deutsche Bank acted with scienter. *See, e.g.*, 3rd Report, App. G at 86 (Deutsche Bank's reliance on Andersen not valid defense); *id.* at 90 (reliance on outside legal counsel by Deutsche Bank not valid defense).

Deutsche Bank's STDs violated the "business purpose" tax rule, which requires all transactions to have a valid business purpose ***other than generating tax savings***. *Id.* As stated by John Buckley, former chief of staff to the Senate Joint Committee on Taxation: ""***All of these transactions have no real business purpose, unless you believe it's to artificially create income to report to shareholders***."" *Id.* But the paperwork for the STDs admits that this was the primary (if not only) reason for each transaction. *See, e.g.*, ¶¶797.13, 797.19, 797.23, 797.29. Artificial inflation of financial results cannot reasonably be a valid business purpose under the federal income tax laws as written by Congress. Indeed, the logic behind the STDs "'is being ***ridiculed*** by many tax experts.'" ¶797.13 (quoting *Business Week*). The First Amended Complaint properly alleges that

Deutsche Bank knew or recklessly disregarded that the STDs were in violation of the tax rules, but nonetheless crafted and executed the STDs to inflate Enron's financial results.

b. The First Amended Complaint's Alleged Role of Deutsche Bank in the STDs Adequately Demonstrates Primary Violations of Rule 10b-5(a) and (c)

Deutsche Bank's STDs were undoubtedly "contrivances, deceitful devices, schemes and courses of business operated to present a falsely positive picture of Enron's financial condition and maintain its high credit ratings, thereby artificially inflating the value of Enron's publicly traded securities and continuing to attract funds from the investing public or encouraging shareholders not to sell." *Enron*, 235 F. Supp. 2d at 693.

The First Amended Complaint alleges that Deutsche Bank played a primary role in the STDs, for Deutsche Bank created each STD and introduced the idea to Enron, including the recognition of present earnings from future speculative tax savings. *See, e.g.*, ¶¶797.4, 797.16, 797.31. Deutsche Bank was oftentimes the only unrelated counterparty to Enron in each transaction. *See, e.g.*, ¶797.12. And, Deutsche Bank's involvement was necessary (not only as an advisor) but as an "accommodation party" willing to act as a strawman to make the STD possible. ¶797.27.

As Enron's Examiner found:

> BT/Deutsche was responsible for designing, promoting and participating in the BT/Deutsche Tax Transactions. The BT/Deutsche Tax Transactions were intended to have, and in fact did have, the effect of increasing Enron's reported net income by approximately $423 million over the period from 1997 to 2001. However, Enron had little business purpose for the BT/Deutsche Tax transactions other than creating accounting income.

3rd Report, App. G at 71. Enron's Examiner further concluded, Deutsche Bank "***designed, promoted and participated***" in the STDs "while ***knowing*** that the transaction[s] served no substantial business purpose for Enron other than enabling Enron to report the potential benefit of speculative future tax deductions in an ***erroneous and misleading manner*** as pre-tax income." 3rd Report, App. G at 3-4; *see also* ¶¶797.1, 797.7. Deutsche Bank even told Enron how to account for the transactions. *See* 3rd Report, App. G at 83 ("BT/Deutsche developed the basic tax and accounting structures and promoted them to Enron as a means of generating accounting income.").

Deutsche Bank asserts that application of the "creator test" articulated by this Court in its December 20 Order mandates dismissal of the First Amended Complaint. Motion at 1, 6. That is incorrect. The "creator test" concerns the making of false statements, not scheme allegations. Whether a defendant "made" or "created" a false and misleading statement has no bearing upon that defendants' liability pursuant to Rule 10b-5(a) and (c). As this Court has repeatedly held: "Securities fraud actions under §10(b) and Rule 10b-5 are not merely limited to the making of an untrue statement of material fact or omission to state a material fact." *Enron*, 235 F. Supp. 2d at 577.[13] Liability attaches where a defendant has "made a material misstatement (or omission) ***or*** committed a manipulative or deceptive act in furtherance of the alleged scheme to defraud." *Id.* at 592. Thus, Deutsche Bank's argument is merely a red herring. The First Amended Complaint more than sufficiently states claims against Deutsche Bank.

c. The First Amended Complaint Pleads a Strong Inference of Scienter Concerning Deutsche Bank's Rule 10b-5(a) and (c) Violations

Deutsche Bank makes the incredible claim that it "exercised care in connection with the SSTs" and that "[b]are allegations ... that any of the SSTs violated GAAP are insufficient to give rise to a strong inference of scienter." Motion at 20-21. Lead Plaintiff pleaded much more than GAAP violations. And, Deutsche Bank's purported exercise of "care" amounted to nothing more than twisting and manipulating the tax and accounting rules. At pages 13-23 of its Motion, Deutsche Bank asserts a litany of purported rationalizations for the propriety of its conduct. Again, this raises factual disputes not suitable for resolution on a motion to dismiss, and ignores Lead Plaintiff's allegations.

Deutsche Bank's STDs were designed to manipulate the accounting and tax rules in an effort to create paper profits without a corresponding business reality. Deutsche Bank cannot now claim to have to done so in good faith, for its transactions had no other business purpose other than to "'***artificially create income to report to shareholders***.'" ¶797.6 (quoting a well-recognized,

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[13]*See also Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 11 n.7 (1971); *Shores v. Sklar*, 647 F.2d 462 (5th Cir. 1981); *In re Lernout & Hauspie Sec. Litig.*, 236 F. Supp. 2d 161, 173-74 (D. Mass. 2003); *Rich v. Maidstone Fin.*, No. 98 Civ. 2569 (DAB), 2002 U.S. Dist. LEXIS 24510 at *22-*23 (S.D.N.Y. Dec. 19, 2002).

independent tax expert). Moreover, Deutsche Bank's role in the STDs is not analogous to those instances cited by Deutsche Bank where courts have found "failure to follow GAAP, without more, does not establish scienter." *Enron*, 235 F. Supp. 2d at 572, 573 nn.11-12. Here, there is more. For example, the STDs added hundreds of millions of dollars to Enron's earnings, the origins of which were never disclosed to Enron's investors and which Deutsche Bank knew could not be disclosed to Enron's investors lest the STDs be discovered by the IRS. *See, e.g.*, ¶797.15.

Deutsche Bank cites an order of this Court and *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1272-73 (N.D. Cal. 2000), claiming that "[p]laintiffs allege no facts indicating that the DB Entities had reason to doubt the legal and tax consequences" of Deutsche Bank's STDs. Motion at 15. That is nonsense. Lead Plaintiff alleges significant GAAP violations. "[W]hen significant GAAP violations are described with particularity in the complaint, [as plaintiffs have done here,] they may provide powerful indirect evidence of scienter." *McKesson*, 126 F. Supp. 2d at 1272-73. Deutsche Bank's STDs were flagrant violations. *See, e.g., In re MicroStrategy Inc. Sec. Litig.*, 115 F. Supp. 2d 620, 638 (E.D. Va. 2000) ("To be sure, the application of accounting principles often involves details and minutiae, but the accounting principle violated here boils down to the well-worn adage, 'Don't count your chickens before they hatch.' These common-sense observations compel the conclusion that the alleged simplicity of the GAAP rules violated here are relevant and contribute probative weight to an inference of scienter."). Indeed, Enron's Examiner could find no authority even supporting the accounting treatment Deutsche Bank told Enron to use. *See* pp. 14-15, *supra*. Because the STDs were designed to enable Enron's recording of the "potential benefit of speculative future tax deductions as current [pre-tax] income," 3rd Report at 28, they were not only unprecedented and without a credible basis, but the STDs violated the most basic of accounting rules regarding recognition of earnings.

Moreover, Deutsche Bank designed the STDs for the very purpose of inflating Enron's quarterly- and annually-reported income during the Class Period. *See, e.g.*, ¶797.6; 3rd Report, App. G at 3-4. Such repeated, material violations of GAAP demonstrate a strong inference of scienter.

> [Defendants incorrectly assert that] "a misapplication of accounting principles or a restatement of financials can never take on significant inferential weight in the scienter calculus; to the contrary, when the number, size, timing, nature, frequency,

> and context of the misapplication or restatement are taken into account, the balance of the inferences to be drawn from such allegations may shift significantly in favor of scienter (or, conversely, in favor of a nonculpable state of mind)."

In re Triton Energy Ltd. Sec. Litig., No. 5:98-CV-256, 2001 U.S. Dist. LEXIS 5920, at *33-*34 (E.D. Tex. Mar. 30, 2001) (quoting *MicroStrategy*, 115 F. Supp. 2d at 634-35).

If that is not enough there are substantial additional facts alleged here that support a strong inference of scienter. Had Deutsche Bank's STDs been legitimate, then Deutsche Bank and Enron would have had no problem telling investors about them. Indeed, SEC and accounting disclosure requirements should have forced Enron to publicly report the STDs because of the fact that 20% of Enron's reported earnings were derived from these (and similar) tax transactions. *See* ¶797.2.[14] But Deutsche Bank and Enron never disclosed the STDs, expressly agreeing to secrete their actions from scrutiny. Enron and Deutsche Bank went so far as to provide for a contractual clause ***nullifying*** Project Steele if it ever had to be disclosed. ¶797.15. Legitimate transactions can withstand the light of day; fraudulent ones cannot. Also, Deutsche Bank was paid relative to how much each transaction inflated Enron's reported earnings. "In each of the BT/Deutsche Tax Transactions, the amount of BT/Deutsche's fee was explicitly linked to the magnitude of the accounting benefits recognized by Enron." 3rd Report, App. G at 83.

And, there is significant evidence alleged that the fundamental purpose of the STDs was to inflate Enron's earnings for accounting purposes. *See* ¶¶797.6, 797.13, 797.19, 797.23, 797.29. But GAAP requires that every transaction must have a legitimate purpose other than merely to alter a company's financial statements. *See also* 3rd Report, App. G at 32 n.153 ("'Entering a transaction solely for the accounting impact is not a valid business purpose.'"). The STDs had no legitimate

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[14] *See also* 17 C.F.R. §229.303(3) ("Describe any unusual or infrequent events or transactions ... that materially affected the amount or reported income from continuing operations and, in each case, indicate the extent to which income was so affected."); FAS 131 ¶¶1, 76 (GAAP demands that "any operating segment [of a company] that constitutes 10 percent or more of reported revenues, assets, or profit or loss be reported separately" and that the financial statements provide "certain information about [such] operating segments").

purpose.[15] Deutsche Bank and Enron agreed to go ahead with the STDs anyway to inflate Enron's earnings by hundreds of millions of dollars.

2. Lead Plaintiff Sufficiently Alleges Deutsche Bank Made False and Misleading Statements in Violation of Rule 10b-5

a. Deutsche Bank's False and Misleading Statements Issued During the Class Period

(1) Analyst Reports

Throughout the Class Period, Deutsche Bank issued analyst reports containing Enron's false and misleading financial results, concealing material adverse information about Enron, and rating Enron's stock inconsistent with its internal information. While stating unmitigated praise for Enron and its business prospects, each of Deutsche Bank's analyst reports concealed that Enron's purported financial results were created by bogus tax schemes and not business operations.

For example, on July 13, 1999, Deutsche Bank issued a report on Enron that rated Enron a "***Buy***," forecasted a 17% three-year EPS growth rate for Enron, and reported Enron's EPS of $[0.27]. ¶159. On October 13, 1999, Deutsche Bank issued a report on Enron rating it a "***Buy***"and noting: "'***We fully anticipate that the company will be capable of producing EPS growth in excess of 15%*** ....'" ¶184. On January 28, 2000, Deutsche Bank issued a report on Enron rating it a "***Buy***," ***raising*** the stock's target price to $90 and forecasting 2000 EPS of $1.35 and a 15% three-year EPS growth rate for Enron. Deutsche Bank also stated:

> "***All we can say is WOW!... Enron stole the show last week at its annual analyst conference in Houston.... Enron management unleashed a strategy that projects monumental earnings potential over the next 5 years....***
>
> ***As such, we are raising our target price on ENE shares .... We reiterate our BUY recommendation on ENE shares.***
>
> ***We believe Enron's 1999 earnings results demonstrate its best-in-class natural gas and power marketing and energy services skills....*** We fully anticipate that the company will be capable of producing EPS growth in excess of 15% ...."

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[15]Taken together, Deutsche Bank's arguments are circular and illogical. According to Deutsche Bank, the STDs purported to comply with tax regulations by violating accounting rules, and purported to comply with accounting rules by violating the tax laws. For tax purposes, the STDs were intended to inflate Enron's accounting income. For accounting purposes, the STDs were intended to cut Enron's taxes.

¶210. Deutsche Bank, however, did not disclose that Enron's 1999 earnings results had been artificially inflated by Projects Steele, Teresa, Cochise, Tomas and Renegade. ¶¶797.1, 797.10.

Similarly, on April 14, 2000, Deutsche Bank issued a report on Enron rating the stock a "***Buy***," raising its price target to $96 and increasing Enron's forecasted 2000 and 2001 EPS to $1.37 and $1.60 and its three-year EPS growth rate to 16%. The report also stated, among other things:

> • "Management reviewed the strong Q1 operating EPS of $0.40/share that produced a 17.7% increase over 1Q99 EPS of $0.34/share.
>
> • ***[S]trong Q1 earnings results and substantial business development in the wholesale, retail, and broadband segments bode well for continued earnings growth.***"

¶232. Again, Deutsche Bank did not disclose that Enron's earnings results had been artificially inflated by Projects Steele, Teresa, Cochise, Tomas and Renegade. ¶¶797.1, 797.10. Deutsche Bank made similar statements in its analyst reports throughout the Class Period. *See* ¶¶127, 131, 146, 152, 159, 184, 210, 232, 237, 243, 253, and 257.

Deutsche Bank's analyst reports on Enron issued after the end of 1999 were false and misleading for another reason. After LJM2 was formed and Deutsche Bank and/or its top executives had secretly been permitted to invest in LJM2 (ultimately to the tune of over $10 million), Deutsche Bank continued to issue very positive analyst reports on Enron. These reports contained the following "boilerplate" disclosure:

> Deutsche Bank Securities Inc., DB Alex. Brown LLC., and their affiliates worldwide, may hold a position or act as market maker in the financial instruments of any issuer discussed herein or act as advisor or lender to such issuer.

Ex. C at 3-4. These boilerplate disclosures were substantially the same as they were before December 1999 – *i.e.*, they did not change after Deutsche Bank and/or its top executives became huge investors in LJM2. In addition to the other material facts not disclosed, Deutsche Bank's failure to disclose its LJM2 investments made its "boilerplate" disclosure false and misleading and concealed from the market the very significant and serious conflict of interests which Enron and Deutsche Bank knew would have cast serious doubts on the objectivity and honesty of Deutsche Bank's analyst reports.

The Court has already recognized the materiality of such omissions. *See Enron*, 235 F. Supp. 2d at 700-01 ("Lead Plaintiff has pointed out that the bank's boilerplate disclosures remained the same as they were before the funding of LJM2 in December 1999, never mentioning specifically the investments of its top executives in the entity, its funding of the partnership during 2001 ... or any of the significant conflicts of interest that would cast doubt on its analysts' objectivity and honesty in evaluating Enron stock.").

(2) Offering Documents

In addition to making false and misleading statements in its analyst reports, Deutsche Bank made false and misleading statements in offering documents in its role as an underwriter of Enron securities. Critically, Deutsche Bank participated in underwriting billions of dollars of off-balance sheet debt between 1999-2001 to finance the Enron Ponzi scheme and falsify Enron's reported cash flows.[16] Each offering was made pursuant to a false and misleading prospectus that incorporated Enron's admittedly false financial statements, which have now been restated. Deutsche Bank sold Enron's securities pursuant to those offering documents even though it had falsified Enron's financial statements via the STDs, and obviously knew Enron's reported financial results were materially false and misleading.

Additionally, Deutsche Bank underwrote certain Enron equity offerings, including Enron's February 1999 offering of 27.6 million shares of common stock at $31.34 – raising $861 million for Enron. ¶790.[17] The prospectus for that offering incorporated Enron's financial results that had been

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[16]In September 1999, Deutsche Bank underwrote the Osprey offering of $1,400,000,000 8.31% Senior Secured Notes due 2003. In August 2000, Deutsche Bank underwrote the Enron Credit Linked Notes Trust offering of $500,000,000 8% Enron Credit Linked Notes due 2005. In September 2000, Deutsche Bank underwrote the Osprey Trust offering of $750,000,000 7.797% Senior Secured Notes due 2003, and €315,000,000 6.375% Senior Secured Notes due 2003. In July 2001, Deutsche Bank underwrote the Marlin Water Trust offering of $475,000,000 6.31% Senior Secured Notes due 2003, and €515,000,000 6.19% Senior Secured Notes due 2003. *See* ¶1016.4.

[17]The Deutsche Bank entity that underwrote the offering, BT Alex. Brown Inc., was acquired by Deutsche Bank on June 4, 1999 and is an affiliate of Bankers Trust Company. ¶107(d).

falsified by Deutsche Bank's Projects Steele and Teresa. *See, e.g.*, ¶797.10. These statements, like Deutsche Bank's analyst reports, are actionable under Rule 10b-5.[18]

b. Deutsche Bank Knew or Recklessly Disregarded that its Statements Misled Investors

The Court "must consider any evidence of scienter pleaded by the plaintiffs ***cumulatively***." *Goldstein*, 2003 U.S. App. LEXIS 15001, at *18. In addition to the fact that Deutsche Bank knew Enron's financial statements to be false because of its work on the STDs, Deutsche Bank was privy to a great deal more alerting it to the true condition of Enron. For instance, Deutsche Bank was one of Enron's Tier 1 banks and was in constant contact with Enron and its senior officers concerning Enron's financial condition. 3rd Report, App. G at 10. By 2000, Deutsche Bank learned Enron's undisclosed off-balance sheet debt was significantly higher than anyone knew:

> In early 2000, BT/Deutsche became cognizant of a change in Enron's balance sheet and income statement.... ***Recognizing that the extent of Enron's off-balance sheet obligations could not be discerned from its financial statements***, BT/Deutsche held several meetings with Enron to probe the increasing dependency of Enron on its trading activities and asset sales. During those meetings, BT/Deutsche requested and received information about [among other things] the level of [Enron's] off-balance sheet obligations.... ***Enron consistently informed BT/Deutsche that its off-balance sheet obligations were in the range of $9-$10 billion***.

Id. at 22-23. Accordingly, there is little doubt that Deutsche Bank knew of a great deal more off-balance sheet debt than Enron publicly disclosed.

Moreover, Deutsche Bank and its executives were invited (and committed) to invest at least $10 million in the lucrative LJM2 partnership. *See* ¶797. As an investor in LJM2, Deutsche Bank learned even more about Enron's questionable transactions. *Enron,* 235 F. Supp. 2d at 617. Deutsche Bank prefunded LJM2 with $1.5 million in late December 1999, so that LJM2 could complete certain transactions with Enron days before year-end 1999 and Enron could artificially boost its 1999 results from operations. *See* ¶797. As the Court previously held, knowledge of LJM2 and the obvious opportunity for self dealing, and LJM2's "promise of extraordinary returns" followed by "actual, exorbitant returns, would raise flags to any objective party investing in it and

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[18]Deutsche Bank is liable for its role in these offerings, which were made in furtherance of the fraudulent scheme to falsify Enron's cashflow and/or maintain the Ponzi scheme, under Rule 10b-5(a) and (c) as well as Rule 10b-5(b).

doing continuing business with Enron." 235 F. Supp. 2d at 697. But Deutsche Bank gained even further knowledge of facts raising flags as to the improper nature of LJM2's transactions, for ***Deutsche Bank had its own designee appointed to LJM2's advisory committee.*** 3rd Report, App. G at 13.

C. Lead Plaintiff Properly Alleges Reliance Under Rule 10b-5(a) and (c) Pursuant to the Fraud-on-the-Market Theory

Ignoring the facts and the law, Deutsche Bank claims that the plaintiffs fail to plead "reliance" as to it with respect to the STDs. Motion at 23. As this Court determined: "Reliance under prongs (a) and (c) can also be established by the fraud-on-the-market doctrine ...." *Enron*, 235 F. Supp. 2d at 693. Lead Plaintiff alleges that the STDs "operated to present a falsely positive picture of Enron's financial condition ... thereby artificially inflating the value of Enron's publicly traded securities" and that plaintiffs relied on these market prices. *Id.*; *see also* ¶¶797, 799, 983-984. These allegations are sufficient.

Deutsche Bank also raises the previously-rejected argument that *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), immunizes it from liability for its conduct. Deutsche Bank is wrong (again), notwithstanding its claim that it cannot be liable for its role in the STDs because "***Enron*** and ***its accountants*** made any and all representations concerning the STDs in Enron's financial statements." Motion at 24 (emphasis in original).[19] Not only is Deutsche Bank liable for its role in the STDs (without making statements) pursuant to Rule 10b-5(a) and (c), but Deutsche Bank conveniently forgets that it made statements about Enron's financial results in analyst reports and offering documents. *See supra* §II.B.2. Plaintiffs more than adequately allege reliance.

D. Lead Plaintiff Properly Alleges Loss Causation

Deutsche Bank contends Lead Plaintiff fails to plead loss causation because the "SST's were [not] the proximate cause for the collapse of the market for Enron." Motion at 24. According to Deutsche Bank, it was "Enron's October 2001 restatement and reduction in shareholder equity and December 2002 [sic] bankruptcy filing" that led to plaintiffs' losses. *Id.* In essence, Deutsche Bank

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[19]Plaintiffs incorporate by reference pages 107-09 of their Omnibus Opposition for the proposition that Deutsche Bank is subject to liability as a primary violator of §10(b), notwithstanding *Central Bank*.

argues for dismissal because it succeeded in concealing the STDs until after Enron imploded. That is not the law.

It is true that plaintiffs' damages were caused by an assortment of conduct that violated §10(b). Deutsche Bank played a significant role in that conduct, for Deutsche Bank was a primary participant in the fraudulent scheme that caused plaintiffs' losses. But Deutsche Bank need ***not*** be the ***sole*** reason for the artificial inflation and subsequent decline in Enron's share price to be liable. *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 649 (7th Cir. 1997). And loss causation is not diminished just because Deutsche Bank's STDs violate Rule 10b-5(a) and (c). Indeed, Deutsche Bank's conduct in Enron's schemes makes it liable for its role – and the damages caused.

See, e.g., Shores, 647 F.2d at 469. "***Whenever the rule 10b-5 issue shifts from misrepresentation or omission in a document to fraud on a broader scale, the search for causation must shift also.***" *Id.* at 472.[20]

In any event, there is no question that the price of Enron's publicly traded securities were artificially inflated during the Class Period as a result of the STDs. Enron reported approximately $446 million in income from the STDs between 1997 and 2001, which surely effected valuations of the Company's securities. ¶797.10.

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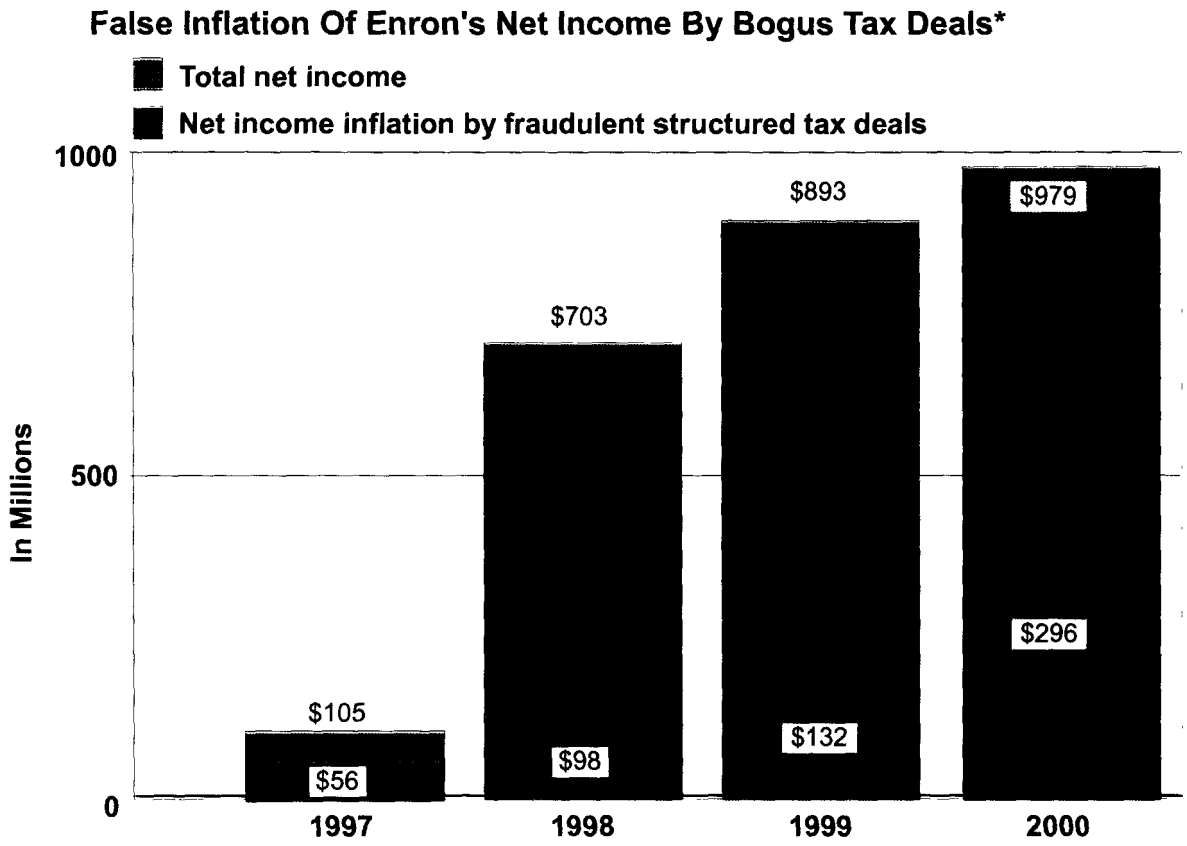
[20] *Accord Enron*, 253 F. Supp. 2d at 573-74; *Lernout*, 236 F. Supp. 2d at 165, 174 n.3 (plaintiffs alleged a defendant company and its financiers, much as Lead Plaintiff pleads here, violated §10(b) and Rule 10b-5 by participating in a "scheme and course of business to defraud" by "setting up, funding, and operating sham entities" and "strategic partners" that executed fraudulent transactions with the defendant company); *Krogman v. Steritt*, No. 3:98-CV-2895-T, 1999 WL 1455757, at *3 (N.D. Tex. July 21, 1999) (plaintiffs "adequately alleged loss causation as well as reliance" by describing an "***elaborate scheme to artificially inflate and maintain the market price***" of the subject stock).



*Source: The Washington Post: Reflecting artificial inflation from 11 Enron fraudulent tax transactions, 6 of which were designed and implemented by Deutsche. These 6 Deutsche transactions accounted for 69% of the total inflation to Enron's net income resulting from tax schemes.

Moreover, it is clear that Enron's publicly traded securities dove to worthlessness because defendants' fraudulent scheme (of which the STDs were a part) could not sustain itself (or fool investors) forever. When one strand of the scheme was drawn out for public scrutiny, the whole scheme unraveled. Enron had become so highly leveraged that it precariously teetered on the brink of destruction merely awaiting the proverbial "last straw to break the camel's back." In some respects, that "last straw" was Enron's November 2001 restatement. But, the fraudulent scheme, of which Deutsche Bank was a primary participant, had placed Enron on a course for destruction years earlier. *See Enron*, 235 F. Supp. 2d at 693. Enron collapsed because the Ponzi scheme could not continue indefinitely, and the 2001 restatement was a symptom, not a cause. Thus, Deutsche Bank's attempt to limit plaintiffs' recovery only to those matters specifically disclosed by the October 2001 restatement is a ruse.

That Deutsche Bank's name and its STDs were not heralded when Enron collapsed does not diminish causation. Rather than the notoriety of Deutsche Bank's deceptive conduct, it is Deutsche Bank's ***participation*** in the Enron Ponzi scheme, combined with Lead Plaintiff's reliance on the integrity of the trading price for Enron stock, that satisfies the element of causation. *See Shores*, 647 F.2d at 469. *See also Enron*, 253 F. Supp. 2d at 573-74 (stating "reliance" component of a §10(b) and Rule 10b-5 action is viewed as a part of the causation requirement). To satisfy the loss causation element, plaintiffs need not have known who caused them to be injured at the time they suffered their damages; nor does loss causation require plaintiffs to know how the fraudulent scheme worked. Rather, the defendants' actions need only "touch upon" or somehow contribute to plaintiffs' damages. *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), *aff'd in part & rev'd in part on other grounds*, 459 U.S. 375 (1983). They did.

Analogous common law scenarios also demonstrate Deutsche Bank's argument to be flawed.[21] Were this a case of a pedestrian struck by a bus, she need not know ***at the time of impact*** who was driving the bus or how they had acted negligently in order to state a claim. Similarly, victims of a Ponzi scheme need not know the name (or names) of the mastermind(s) orchestrating the scheme at the time they are defrauded to state a claim against them. To require more of plaintiffs here is contrary to the law and the realities of the financial markets.

Indeed, financial experts acknowledge the fact that investors act without knowing all the details of an expected fraud, anticipating impact of yet undisclosed aspects of fraudulent schemes.[22] Here, the market for Enron's securities not only collapsed because Enron disclosed certain bad information – it collapsed because of investors' growing fears and suspicions that Enron's prior

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[21]Loss causation under Rule 10b-5 is derived from traditional common law. *See, e.g., Beedie v. Battelle Mem'l Inst.*, No. 01 C 6740, 2002 U.S. Dist. LEXIS 171, at *8 (N.D. Ill. Jan. 4, 2002) ("Loss causation is the standard common law fraud rule, and has been borrowed by the federal courts for use in federal securities fraud cases.").

[22]This is commonly referred to as "the cockroach theory," which proffers: "Unpleasant surprises are like cockroaches – you rarely find just one." Steven T. Goldberg, "The Cockroach Theory, and Seven Other Ways to Know When to Sell," *Kiplinger's Personal Finance*, July 2003 (Ex. D). *See also* Julie Earle-Levine, "Learning to Read Between the Lines," *Financial Times*, June 11, 2003 ("'[F]undamentals are like cockroaches. If you see one piece of bad news, there will be more.'") (Ex. E).

results were really just smoke and mirrors created by a complex fraudulent scheme. Investors were right. And, because Deutsche Bank created some of the smoke and mirrors that made the fraudulent scheme possible, Deutsche Bank proximately caused plaintiffs' damages.

a. The First Amended Complaint Alleges Deutsche Bank's STDs Proximately Caused Plaintiffs' Damages

(1) Plaintiffs' Purchase of Enron's Securities at Artificially Inflated Prices Demonstrates Loss Causation

Loss causation merely requires that a defendants' action "touches upon the reasons for the [plaintiffs'] investment's decline in value." *Huddleston,* 640 F.2d at 549; *see also Nathenson*, 267 F.3d at 413 n.10 (defendants' actions only need "'***touch***[] upon the reasons for the investment's decline in value'"). They have. Applying the "touches upon" standard, the Ninth Circuit recently held:

> This "touches upon" language is admittedly ambiguous.... Our cases have held, however, that: "[i]n a fraud-on-the-market case, plaintiffs establish loss causation if they have shown that the price ***on the date of purchase*** was inflated because of the misrepresentation." ... Accordingly, for a cause of action to accrue, it is not necessary that a disclosure and subsequent drop in the market price of the stock have actually occurred, because ***the injury occurs at the time of the transaction***. It is at that time that damages are to be measured. Thus, loss causation does not require pleading a stock price drop following a corrective disclosure or otherwise. ***It merely requires pleading that the price at the time of purchase was overstated and sufficient identification of the cause.***

Broudo v. Dura Pharms., Inc., 339 F.3d 933, 2003 U.S. App. LEXIS 15621, at *10-*12 (9th Cir. 2003). *Accord Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 832 (8th Cir. 2003) ("[P]laintiffs were harmed when they paid more for the stock than it was worth. This is a sufficient allegation."); *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 97-98 (2d Cir. 2001) ("[P]laintiffs may allege transaction and loss causation by averring both that they would not have entered the transaction but for the misrepresentations and that the defendants' misrepresentations induced a disparity between the transaction price and the true 'investment quality' of the securities ***at the time of transaction***."); *Coates v. Heartland Wireless Communs. Inc.*, 26 F. Supp. 2d 910, 922 (N.D. Tex. 1998) (where plaintiff alleges damages "'as a result of the inflation of the price of [company's] common stock during [the class period]' ... the allegation is sufficient" to plead loss causation).

As demonstrated in the foldout chart herewith and in the First Amended Complaint, during the Class Period, plaintiffs and the class purchased Enron securities at prices inflated by Enron's false and misleading financial results attributed to Deutsche Bank's fraudulent STDs.[23]

(2) The Collapse of Enron and its Scheme, in Part Perpetrated by Deutsche Bank, Demonstrates Loss Causation

The STDs were a substantial factor contributing to and causing plaintiffs' damages, which is clearly evident from a simple analysis of what happened at Enron. Plaintiffs' investments were rendered worthless when Enron imploded under the weight of its debts. ¶3. Unbeknownst to plaintiffs (and everyone but defendants), Enron had incurred substantial off-balance sheet debts, which was a substantial contributing factor to Enron being forced into bankruptcy. *See, e.g.*, ¶¶55-56, 69. Enron incurred much of this hidden debt to artificially inflate Enron's cash flow from operations, which was necessary to match its artificially inflated earnings. *See, e.g.*, ¶¶18-19, 46. Why did Enron need to do so? Because, as clearly demonstrated above, Enron's earnings during the Class Period were substantially and artificially inflated by such transactions as the STDs – and the STDs artificially inflated Enron's earnings without providing Enron any actual cash flow. *See also* ¶¶797.2, 797.4. The very nature of the STDs, which Deutsche Bank knew would create false earnings without providing Enron associated cash flow, required Enron to find artificial (*i.e.*, fraudulent) sources of cash to match its earnings.[24] Revelation of Enron's false earnings and massive off-balance sheet debt caused Enron to implode and go bankrupt at the end of the Class Period, thereby further demonstrating causation of plaintiffs' losses, and damages.

b. Deutsche Bank's False and Misleading Statements Proximately Caused Plaintiffs' Damages

It is telling that Deutsche Bank ignores Lead Plaintiff's allegations that it inflated the trading price of Enron securities by releasing false and misleading analyst reports to the public and misrepresenting Enron's financial condition in SEC filings. ¶¶795-796. That too caused plaintiffs'

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[23]*See also* pages 110-14 of the Omnibus Opposition, which Lead Plaintiff hereby incorporates by reference.

[24]Investors watch closely the gap between reported earnings and actual cash flow, an indicator of the quality of earnings. This was a substantial concern at Enron. *See* ¶¶18-20.

damages. "To avoid dismissal for failure to allege causation, Plaintiffs need only allege 'facts which show that Defendants' omissions and misrepresentations ***caused the market price of the stock to be artificially inflated***, and therefore to appear to be a good risk for investment, so that ***when the truth came out about the company's condition, the stock lost value and Plaintiffs suffered a loss***.'" *Griffin v. GK Intelligent Sys.*, 87 F. Supp. 2d 684, 688 (S.D. Tex. 1999); *Robertson v. Strassner*, 32 F. Supp. 2d 443, 449 (S.D. Tex. 1998).[25] As demonstrated above, plaintiffs have more than adequately alleged that Deutsche Bank made materially false and misleading statements with scienter. When these statements were shown to be false, because Enron's financial condition was not what Deutsche Bank had represented it to be, Enron collapsed and investors were damaged. For all these reasons, Deutsche Bank's causation arguments fail.

E. The First Amended Complaint Pleads Deutsche Bank Violated §12(a)(2)

1. Plaintiffs Adequately Pleaded that Deutsche Bank's Offerings Were Public

Deutsche Bank erroneously contends that plaintiffs' §12(a)(2) claims are barred because the offerings in questions were private sales. *See* Motion at 27.[26] "The S.E.C. has stated that the question of public offering is one of fact and must depend upon the circumstances of each case." *Hill York Corp. v. Am. Int'l Franchises, Inc.*, 448 F.2d 680, 687 (5th Cir. 1971). Moreover, Deutsche Bank "bear[s] the burden of proving this affirmative defense, [and] must therefore show that [each] offering was private." *Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893, 899 (5th Cir. 1977). This, Deutsche Bank cannot do. *See* Omnibus Opposition at 38-48 (which is incorporated herein by reference). Indeed, the smallest offering underwritten by Deutsche Bank was $500 million. This alone is enough to qualify each offering as a public sale of securities. *See, e.g., SEC*

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[25] *Accord Zuckerman v. Foxmeyer Health Corp.*, 4 F. Supp. 2d 618, 626 (N.D. Tex. 1998); *see also Scattergood v. Perelman*, 945 F.2d 618, 624 (3d Cir. 1991) (plaintiffs need only allege "the market price paid by the plaintiffs exceeded the value of the stock at the time of purchase based on the true facts").

[26] Notably, Deutsche Bank suggests that each offering is exempt from liability under §12 as each was made pursuant to Rule 144A ***and*** Regulation S. *See* Motion at 27. Regulation S offerings, however, are subject to §12 liability. *See Sloane Overseas Fund, Ltd. v. Sapiens Int'l Corp., N.V.*, 941 F. Supp. 1369, 1376 (S.D.N.Y. 1996) ("an offering issued pursuant to Regulation S is subject to liability under §12(2) if it is a public offering").

v. Murphy, 626 F.2d 633, 646 (9th Cir. 1980) ("Without question, [a sale of $7.5 million in securities] is a sizeable offering, and it is one that we are inclined to consider as public ....").

Further, the securities in question were offered to a large number of investors. *See* Omnibus Opposition at 41. While the courts have moved away from the use of arbitrary numbers, "[i]n the past the S.E.C. has utilized the arbitrary figure of twenty-five offerees as a litmus test of whether an offering was public." *Hill York Corp.*, 448 F.2d at 688. "Obviously, however, the more offerees, the more likelihood that the offering is public." *Id.*; *see also Doran*, 545 F.2d at 900-01. Moreover, as it is an affirmative defense, "defendants have the burden of proof regarding the number of offerees." *Doran*, 545 F.2d at 901. Here, Deutsche Bank offers no evidence (nor should it be able to on a motion to dismiss) to contradict plaintiffs' pleadings concerning the number of offerees in these securities offerings. Similarly, Deutsche Bank offers no evidence to satisfy its burden – nor can it – showing that each of the offerees had a preexisting relationship with Enron. *See Hill York Corp.*, 448 F.2d at 688 ("The relationship between the offerees and the issuer is most significant. If the offerees know the issuer and have special knowledge as to its business affairs, such as high executive officers of the issuer would possess, then the offering is apt to be private."). Here, it is quite clear that the offerees did not have access to the same information available to Mr. Skilling or Mr. Fastow. Accordingly, the offerees should be afforded the protection concomitant with a public offering of securities under the federal securities laws.

Finally, Deutsche Bank cannot refute – and never will be able to refute – the fact that this offering was made "through the facilities of public distribution such as investment bankers or the securities exchanges." *Hill York Corp.*, 448 F.2d at 689. Where, as here, the offering took place via investment banks, courts are loathe to find that the offering was private. *Id.* at 688.

2. Plaintiffs Have Standing

Deutsche Bank also claims that plaintiffs do not have standing to bring §12(a)(2) claims against DBSI. *See* Motion at 27-28. However, plaintiff Imperial County Employees Retirement System ("ICERS"), who filed a motion to intervene in this action as a Class representative on August 27, 2003, purchased $345,000 par value of Marlin Notes on July 12, 2001 and has standing to bring a claim under §12(a)(2). *See* Imperial County Employees Retirement System's and IHC Health

Plans, Inc.'s Motion to Intervene Under Fed. R. Civ. P. 24(b)(2). Additionally, IHC Health Plans, Inc., who purchased $2,000,000 par value of Yosemite notes on May 18, 2001 and has likewise moved to intervene as a Class representative, has standing to bring a claim under §12(a)(2). *Id.* Accordingly, Deutsche Bank's motion to dismiss plaintiffs' §12(a)(2) claims should be, plaintiffs respectfully submit, denied.[27]

F. The First Amended Complaint Properly States Claims Against the Deutsche Bank Entities for Control Person Liability[28]

DBTC is a wholly owned subsidiary of Deutsche Bank AG, and has been at all times since June 4, 1999. ¶107(d). Likewise, DBSI is a subsidiary of Deutsche Bank AG. ¶107(b).[29] Plaintiffs allege that Deutsche Bank is an integrated financial services institution composed of divisions and subsidiaries, including DBSI and DBTC who are named as defendants. ¶107. Plaintiffs allege that Deutsche Bank "conducts its business affairs through a series of wholly owned and controlled subsidiaries," and plaintiffs allege that Deutsche "directly or indirectly" own all the stock of its subsidiaries and "completely" directs and controls their business operations. ¶99.1. Control is effectuated by, among other things, ownership and "the selection and appointment of their officers and, where necessary, directors." *Id.* This is more than enough to adequately plead control. As this Court has held, Rule 9(b)'s heightened pleading requirements do not apply to control person

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[27]Plaintiffs note that purchasers of these foreign debt securities maintain viable claims as to Deutsche Bank pursuant to §10(b) of the Exchange Act regardless of whether any plaintiff has standing to bring §12(a)(2) claims and regardless of whether the offerings at issue here are deemed to be private sales not subject to liability under §12(a)(2). Lead Plaintiff and the Class representatives clearly have standing to bring §10(b) claims on behalf of the purchasers. And, §10(b) is applicable to the sale of securities public or private. *See, e.g.,* 17 C.F.R. §230.144A Preliminary Notes 1. ("This section relates solely to the application of section 5 of the [Securities] Act and not to antifraud or other provisions of the federal securities laws.").

[28]Plaintiffs' arguments that the First Amended Complaint properly alleges control liability are more fully set forth at pages 51-59 of the Omnibus Opposition, which Lead Plaintiff hereby incorporates by reference.

[29]Plaintiffs dispute Deutsche Bank's assertion that Deutsche Bank AG "could not have asserted control over DBSI until December 3, 1999." Motion at 29. At all times, DBSI was a subsidiary of Deutsche Bank AG. ¶107(b). The Affidavit of Sonja K. Olsen, submitted as Exhibit 2 to the Deutsche Bank's Motion, does not disprove or in any way challenge the accuracy of this fact. Moreover, to the extent that DBSI acquired any Bankers Trust entity on June 4, 1999, plaintiffs note that those Bankers Trust entities were controlled by Deutsche Bank AG as of June 4, 1999 and not December 3, 1999 as Deutsche Bank erroneously contends. *See, e.g.*, Motion, Ex 2, ¶2.

allegations and instead "***Rule 8's notice pleading standard*** would better effect" the remedial legislative history behind §§15 and 20(a). *In re Enron Corp. Sec. Litig.*, No. H-01-3624, 2003 U.S. Dist. LEXIS 1668, at *44 (S.D. Tex. Jan. 26, 2003). Thus, because plaintiffs have adequately alleged control and predicate primary violations of the federal securities laws, plaintiffs respectfully submit that the Court should deny Deutsche Bank's motion to dismiss plaintiffs' control person claims as to Deutsche Bank AG.

III. CONCLUSION

For all the reasons stated herein, Deutsche Bank's Motion should be denied.

DATED: September 25, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE DEUTSCHE BANK DEFENDANTS' MOTION TO DISMISS document has been served by sending a copy via electronic mail to serve@ESL3624.com on this 25th day of September, 2003.

I further certify that a copy of the foregoing PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE DEUTSCHE BANK DEFENDANTS' MOTION TO DISMISS document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 25th day of September, 2003.

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Mo Maloney

The Exhibit(s) May

Be Viewed in the

Office of the Clerk